

FEDERAL CIRCUIT COURT OF AUSTRALIA

KUMAR v MINISTER FOR IMMIGRATION & ANOR

[2020] FCCA 4

Catchwords:

MIGRATION – Review of Administrative Appeals Tribunal decision – refusal of a partner visa – Tribunal finding the relationship to be contrived – general grounds of review – no jurisdictional error.

Legislation:

Migration Act 1958 (Cth), ss.5F, 359, 359A, 359AA, 375, 375A, 438
Migration Regulations 1994 (Cth)

Cases cited:

AIR15 v Minister for Immigration [2016] FCA 1808
ANA18 v Minister for Home Affairs [2018] FCA 1854
Applicant WAE v Minister for Immigration (2003) 236 FCR 593
BQN16 v Minister for Immigration & Anor [2019] FCCA 481
CHZ19 v Minister for Home Affairs [2019] FCA 914
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337
He v Minister for Immigration [2017] FCAFC 206
Minister for Immigration v Singh (2016) 244 FCR 305
Minister for Immigration v SZNPG [2010] FCAFC 51
Minister for Immigration v Truong [2016] FCAFC 54
Minister for Immigration v Yusuf (2001) 206 CLR 323
Nguyen v Minister for Immigration [2019] FCA 159
Parvin v Minister for Immigration [2019] FCAFC 86
SZBYR v Minister for Immigration (2007) 81 ALJR 1190
SZNXA v Minister for Immigration [2010] FCA 775
SZTOG v Minister for Immigration [2018] FCA 112
SZUMR v Minister for Immigration [2017] FCA 1376
Tran v Minister for Home Affairs [2019] FCA 1126
WZAVW v Minister for Immigration [2016] FCA 760

Applicant:

SATISH KUMAR

First Respondent:

MINISTER FOR IMMIGRATION,
CITIZENSHIP, MIGRANT SERVICES
AND MULTICULTURAL AFFAIRS

Second Respondent:

ADMINISTRATIVE APPEALS
TRIBUNAL

File Number: SYG 1642 of 2019
Judgment of: Judge Driver
Hearing date: 29 November 2019
Delivered at: Sydney
Delivered on: 26 February 2020

REPRESENTATION

The Applicant appeared in person

Solicitors for the Respondents: Ms K Morris of Clayton Utz

ORDERS

- (1) The application filed on 3 July 2019 is dismissed.
- (2)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 1642 of 2019

SATISH KUMAR

Applicant

And

**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS**

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. The applicant, Mr Kumar, seeks judicial review of a decision of the Administrative Appeals Tribunal (Tribunal) made on 5 June 2019. The Tribunal affirmed a decision of a delegate of the Minister (delegate) not to grant Mr Kumar a partner (residence) visa.
2. The delegate had refused to grant Mr Kumar a partner (Residence) (Class BS) (Subclass 801) visa (permanent partner visa), for which he had applied on 16 August 2012.¹ A previous decision of the Tribunal (differently constituted) made on 3 May 2017 had been set aside by

¹Court Book (CB) 1-45

consent on 25 October 2017 on the basis that the Tribunal had failed to consider all of the matters within regulation 1.15A(3) of the *Migration Regulation 1994* (Cth) (Regulations).² Following the remittal of the matter, Mr Kumar appeared twice before the Tribunal to give further evidence and submissions.³

3. Mr Kumar is a citizen of India, who first arrived in Australia on 12 November 2006 on a business (Short Stay) visa (subclass 456) which expired on 12 December 2006 (temporary business visa).⁴ Mr Kumar previously made an unsuccessful application for a protection visa (on 19 December 2006).⁵ On 2 August 2012, he was successful in having the 8503 (No Further Stay) condition attached to his temporary business visa waived⁶ and then applied, on 16 August 2012, for a partner (temporary) (Class UK) (Subclass 820) visa (temporary partner visa) and permanent partner visa.⁷ On 1 July 2014, Mr Kumar was successful in having criterion 3001 waived and was granted a temporary partner visa.⁸ On 2 November 2014, he provided further information in support of his permanent partner visa application.⁹ On 19 October 2015, after inviting Mr Kumar to comment on certain adverse information¹⁰ and receiving a response from Mr Kumar's representative in respect of same,¹¹ the delegate refused to grant Mr Kumar a permanent partner visa.¹² Mr Kumar sought review before the Tribunal, which affirmed the delegate's decision on 4 May 2017.¹³ However, as noted, that decision was quashed and the matter subsequently remitted to a (differently constituted) Tribunal on 25 October 2017.¹⁴ Mr Kumar appeared before the Tribunal on 18 April and 29 May 2019 to give evidence and present arguments.¹⁵ He also

² CB 288-292, 342 [4]

³ CB 342 [5]

⁴ CB 2, 15, 63, 77, 260

⁵ CB 77

⁶ CB 39-41

⁷ CB 108-112

⁸ CB 63, 108

⁹ CB 113-159

¹⁰ CB 161-165

¹¹ CB 176-201

¹² CB 205-209

¹³ CB 250-258

¹⁴ CB 288-289

¹⁵ CB 296, 299-304 [5], [7]

provided further documents and submissions.¹⁶ On 5 June 2019 the Tribunal affirmed the delegate's decision of 4 May 2017.¹⁷

4. The Tribunal noted the procedural history of the matter before it at [1]-[9], and set out the relevant statutory criteria under clause 801.221(2) (c) and regulation 1.15A(3) of the Regulations. The Tribunal accepted at [10] that Mr Kumar and his sponsor (Ms Clarke) were married, for the purposes of s.5F(2)(a) of the *Migration Act 1958* (Cth) (Migration Act). However the Tribunal found at [11] that the relationship between Mr Kumar and Ms Clarke was "contrived" having regard to its adverse credibility findings, Mr Kumar's inconsistent evidence throughout the application process, Mr Kumar's and Ms Clarke's inconsistent evidence, the available adverse information and Mr Kumar's response to the adverse information.¹⁸ In particular, the Tribunal took into account the following:
 - a) the inconsistency between Mr Kumar's own evidence as to who made payment of his visa application, and the details provided in his visa application.¹⁹ Whilst the Tribunal was "prepared to accept" aspects of Mr Kumar's explanation, it found at [14] and [16] that his change in response was a "contrivance in an attempt to explain the inconsistency" and also an attempt to conceal the nature of his relationship with another woman, Ms Kaur;
 - b) the inconsistencies in Mr Kumar's evidence as to how and when he met Ms Kaur;²⁰
 - c) evidence obtained by the Minister's Department from Ms Kaur's mother in India that Ms Kaur and Mr Kumar were married, and Ms Kaur was in a "contrived relationship with her Australian sponsor".²¹ The Tribunal did not accept Mr Kumar's submission that the departmental officers who had obtained that evidence were "corrupt". Nor did the Tribunal accept at [18] and [20]-[23] Mr Kumar's submission that the information was irrelevant

¹⁶ CB 305-338

¹⁷ CB 341-357

¹⁸ [11]-[43]

¹⁹ CB 21 at [12]-[13]

²⁰ [12], [15]

²¹ [17], [19]

and/or Ms Kaur's mother was lying. The Tribunal also took into account Mr Kumar's earlier submissions on this information, and was not satisfied that he had put forward a plausible explanation for that adverse information;²²

- d) evidence obtained by the Minister's Department from Centrelink, indicating that although Mr Kumar and Ms Clarke registered their marriage in March 2012, Ms Clarke did not inform Centrelink until July 2014.²³ The Tribunal regarded this as "troublesome" and considered that this conduct demonstrated *either* that Ms Clarke was "prepared to be dishonest in her dealings" with government agencies or that she "did not consider herself to be in (sic) genuine and committed relationship" and stated that this raised serious concerns;²⁴ and
- e) evidence from the Australian Border Force indicating that Mr Kumar was under investigation into "a contrived marriage syndicate".²⁵ The Tribunal noted that this investigation raised "concern" and "further doubts" which were not allayed by Mr Kumar's response to that information.²⁶

5. The Tribunal also considered each of the matters set out in regulation 1.15A(3)²⁷ as follows:

- a) as to the "nature of...[their] commitment", the Tribunal was prepared to accept that Mr Kumar and Ms Clarke had known each other and maintained a connection "for many years now", however was not satisfied that they were in a genuine and committed relationship.²⁸ The Tribunal in this regard found at [48] that Mr Kumar's and Ms Clarke's responses "did not give the impression" of a committed relationship and also took into account Mr Kumar's inconsistent evidence as to who attended his wedding²⁹ and his failure to recall that Ms Kaur had been one of

²² [24]-[32]

²³ [24]-[32]

²⁴ [37]

²⁵ [37]

²⁶ [43]

²⁷ CB 357

²⁸ [52]

²⁹ [49]-[51]

the witnesses, which the Tribunal regarded as indicating an attempt by Mr Kumar to "conceal" her attendance;³⁰

- b) as to the "financial aspects" of their relationship, the Tribunal noted at [53]-[54] that Mr Kumar and Ms Clarke had no joint assets or debts, and found that their arrangements appeared "very transactional". The Tribunal also took into account at [55]-[62] Mr Kumar's contradictory evidence as to his employment situation and previous business and found that Mr Kumar's submissions on this issue "heightened" its credibility concerns.³¹ The Tribunal accepted at [64]-[65] that Mr Kumar had provided certain receipts for household items but found they did not, of themselves, indicate a genuine relationship;
- c) as to the "social aspects", the Tribunal noted at [67] that Mr Kumar and Ms Clarke had given inconsistent evidence, that Mr Kumar's parents did not know any details of Ms Clarke,³² that Mr Kumar did not know many details of Ms Clarke's best friend,³³ and that Ms Clarke and Mr Kumar had given inconsistent evidence as to Mr Kumar's best friend.³⁴ The Tribunal acknowledged that Mr Kumar had provided various supporting statements, but noted that they provided no details as to the relationship, and for that reason did not give them any weight.³⁵ For those reasons, the Tribunal was not satisfied that the social aspects supported the application;³⁶ and
- d) as to the "nature of the household", the Tribunal found at [76]-[77] that Mr Kumar and Ms Clarke had provided consistent evidence as to their food preparation and use of the living space but had provided inconsistent evidence as to Mr Kumar's working hours³⁷. The Tribunal was also not satisfied at [79] that photographs provided were dispositive evidence of the

³⁰ [51]

³¹ [63]

³² [68]

³³ [69]-[70]

³⁴ [71]-[72]

³⁵ [73]

³⁶ [74]

³⁷ [78]

genuineness of the relationship and found that their household was not as would be expected from a genuine and committed relationship.³⁸

6. In its reasons, the Tribunal also noted that various certificates had been issued in respect of Mr Kumar's file and made the following findings and comments in respect of those certificates:

- a) that there was a s.376 certificate³⁹ covering the report of the "offshore visit conducted by Departmental officers", which the Tribunal had alerted Mr Kumar to and invited comments on. The Tribunal was satisfied at [33] that this certificate was valid, and noted that Mr Kumar agreed with that conclusion;
- b) that there was a second s.376 certificate⁴⁰ covering the "Centrelink information", which the Tribunal had again alerted Mr Kumar to and invited comments on. The Tribunal was again satisfied at [38] that this certificate was valid, and noted that Mr Kumar agreed with that conclusion; and
- c) that there were two s.375A certificates⁴¹ covering a departmental report of a site visit to Mr Kumar's and Ms Clarke's home, and information relating to the offshore interview with Ms Kaur's parents, which it had discussed with Mr Kumar.⁴² The Tribunal was satisfied at [40]-[41] that the certificates were valid and noted that Mr Kumar agreed with that conclusion.

7. Ultimately, the Tribunal, although accepting that Mr Kumar and Ms Clarke were married, had spent time together and shared a household, and recognising that they had provided a "substantial amount" of documentary evidence (although finding that this was not dispositive⁴³), was not satisfied that s.5F(2) was met.⁴⁴ The Tribunal in particular, at [83], had "extensive concerns" as to Mr Kumar's credibility and as to the evidence that Mr Kumar was in fact married to

³⁸ [80]

³⁹ CB 244

⁴⁰ CB 228

⁴¹ CB 227, 293

⁴² [39], [41]

⁴³ [82]

⁴⁴ [85]

someone else (Ms Kaur). For these reasons, the Tribunal was not satisfied that Mr Kumar and Ms Clarke had a mutual commitment to a shared life together to the exclusion of all others, that they were in a genuine and continuing relationship, or that they were living together (or not separately and apart) on a permanent basis.⁴⁵ Accordingly, the Tribunal found at [85]-[88] that the statutory criteria were not satisfied and affirmed the delegate's decision.

The current proceedings

8. Mr Kumar made an application for judicial review dated 3 July 2019. That application was originally dismissed on 25 July 2019 for non-appearance, but was reinstated on 12 September 2019. I provided Mr Kumar with the opportunity to file an amended application and further evidence by 31 October 2019, and to file submissions 14 days before the final hearing (i.e. by 15 November 2019). Mr Kumar has not availed himself of these opportunities.
9. As the Minister notes in his submissions, by his application filed on 3 July 2019, Mr Kumar has set out (in essence) 4.5 pages of "submissions" but no particularised or clear grounds of review. The following matters, however, appear to be raised by those submissions:
 - a) the Tribunal's decision was legally unreasonable and erroneous because, given the information and evidence before the Tribunal, "the Tribunal if acting unbiased, and in accordance with proper law could not reach a conclusion other than the fact that my wife and I are in a genuine and continuing relationship"⁴⁶ (Ground 1);
 - b) the Tribunal "drew incorrect inferences from the evidence", failed to place "sufficient weight and consideration to the evidence before it", made "different inferences" from the evidence, took into account "a number of irrelevant considerations", failed to take into account relevant considerations and evidence, and erred in "giving more weight to hearsay information".⁴⁷ In particular, the Tribunal erred in its consideration of the evidence relating to

⁴⁵ [84]

⁴⁶ Application page 4 [11]-[12], page 5 [12](vii), page 7 [19]

⁴⁷ Application page 4-5 [11]-[12], page 7 [17]-[18], [21]-[22]

Ms Kaur's mother at [19]-[33], [42])⁴⁸ and his relationship with Ms Kaur at [12]-[16]⁴⁹ (Ground 2); and

- c) the Tribunal denied Mr Kumar procedural fairness, at, and showed bias in its use of information relating to Zip Transport Pty Ltd and Roam Tolling Pty Ltd (Ground 3).⁵⁰

10. The application is supported by a lengthy affidavit filed with it, which I received as a submission. I also have before me as evidence the court book filed on 17 September 2019 and the affidavit of Kathleen Anne Morris (the Minister's solicitor) made on 22 November 2019. Ms Morris deposes as to a series of certificates issued to the Tribunal under s.375A and s.376 of the Migration Act and annexes documents purportedly covered by those certificates. At the request of the Minister I made a suppression order in relation to the documents annexed to the affidavit.
11. Mr Kumar attended court at the trial of this matter on 29 November 2019 with his friend, Ms Kaur. He sought the opportunity for Ms Kaur to give evidence in support of his case. I permitted Ms Kaur to make a statement from the bar table in order to determine the potential relevance of any evidence she might give. While her statement was lengthy, it boiled down to the simple proposition that she is in a genuine relationship with her sponsor, has had a baby with him, and is now a permanent resident. Her statement, in effect, raised the rhetorical question: if it has been accepted that Ms Kaur is in a genuine and exclusive relationship with her sponsor, how could it be that Mr Kumar is also in a relationship with her? Ms Kaur emphatically denies that she is or has been in a relationship with Mr Kumar but acknowledges that they are good friends. While Ms Kaur's statement might have assisted Mr Kumar before the Tribunal, it does not assist him in these proceedings.
12. I queried with Mr Kumar (and Ms Kaur) why she had not given evidence to the Tribunal. His response to the second Tribunal hearing invitation⁵¹ identifies only himself and his wife as witnesses. They

⁴⁸ Application page 6 [13]

⁴⁹ Application page 6 [14]

⁵⁰ Application page 6 [12](viii), [15], page 7 [20]; decision at [56]-[58]

⁵¹ CB 303

responded that Ms Kaur was at that time pregnant and hence unavailable. I queried why Ms Kaur had, nevertheless, not made a written statement which might have supported Mr Kumar's claims. Mr Kumar conceded that that was an oversight on his part. I suggested to Mr Kumar that he might now obtain a written statement from Ms Kaur in the event that he wished to make a further submission to the Minister. That is beyond the scope of this proceeding.

13. Mr Kumar's oral submissions did not otherwise advance his grounds of review in any material way.

Consideration

14. I accept the Minister's submissions concerning the grounds of review advanced.
15. At the outset the Minister submits and I accept that, notwithstanding the attempt that has been made (above) to distil grounds of review from Mr Kumar's application, his contentions are essentially unparticularised and fail to adequately specify the errors said to have been committed by the Tribunal or how any such errors could constitute jurisdictional error. It should not be left to the Minister, or the Court, to attempt to identify or surmise those alleged errors.⁵² These deficiencies alone are sufficient to support the dismissal of this application.⁵³

Grounds 1 and 2

16. The relevant statutory scheme governing the grant of a permanent partner visa was summarised by the Full Federal Court in *He v Minister for Immigration*⁵⁴ at [22]-[30], [47]-[52]. Their Honours there observed that:⁵⁵

⁵² See *AIR15 v Minister for Immigration* [2016] FCA 1808 at [19]. See also *BQN16 v Minister for Immigration & Anor* [2019] FCCA 481 at [4] and the cases cited therein; *SZTOG v Minister for Immigration* [2018] FCA 112 at [17], [24]-[26], [29]-[30] and [32]

⁵³ *WZAVW v Minister for Immigration* [2016] FCA 760 at [35]; *SZNXA v Minister for Immigration* [2010] FCA 775 at [21]; *ANA18 v Minister for Home Affairs* [2018] FCA 1854 at [59] (see also *BQN16* at [4] and cases cited therein)

⁵⁴ [2017] FCAFC 206

⁵⁵ at [51]-[52]

Section 5F of the Act gives the word “spouse” a narrower definition than its ordinary meaning by imposing the four conditions that are required to be satisfied. The definition seems designed principally to avoid sham or contrived marriages being used to obtain the grant of visas. The conditions that the persons must have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that the relationship be genuine and continuing are impressionistic and evaluative: Ally v Minister for Immigration & Citizenship [2008] FCAFC 49 at [40]. The requirement of reg 1.15A(2) that the Minister must consider all the circumstances of the relationship recognises that the nature of marital relationships is infinitely varied and incapable of being fully described. The presence or absence of any particular circumstance in a marriage does not necessarily mean that the marriage is or is not genuine. However, reg 1.15A(3) sets out particular circumstances that the Minister is required to consider, presumably on the basis that these circumstances are considered to be of particular relevance or significance to determining whether a marriage satisfies the conditions set out in s 5F(2) of the Act.

The matters set out in reg 1.15A(3) are relevant considerations which the decision-maker is bound to consider: see Minister for Immigration & Border Protection v Angkawijaya (2016) 236 FCR 303 at [51]. This requires a decision-maker to bring an active intellectual process to each of those matters: Tickner v Chapman (1995) 57 FCR 451 at [462], [476], [495]; Carrascalao v Minister for Immigration & Border Protection [2017] FCAFC 107 at [45] (and the authorities cited therein). In other words, the decision-maker must actively think about each such matter. Further, the term “consider” imports an obligation to give proper, genuine and realistic consideration to the relevant matters: Bondelmonte v Bondelmonte (2017) 341 ALR 179; [2017] HCA 8 at [43]. The requirement to give proper, genuine and realistic consideration to a matter necessarily incorporates the application of an active intellectual process. These authorities do not suggest that a requirement to “consider” a matter may not require a decision-maker to do more in an appropriate statutory context.”

17. In the present case, it does not appear to be disputed that the Tribunal proceeded in accordance with this statutory scheme or that the Tribunal had regard to each of the mandatory relevant considerations contained in regulation 1.15A(3). This, as the Minister submits, is also plainly

evident from the Tribunal's reasons.⁵⁶ Relevantly, although the Tribunal was required to consider each of the 15 matters set out in regulation 1.15A(3)⁵⁷ it was not required to "formulaically address[s]" each in turn and the "impressionistic and evaluative nature" of the Tribunal's task must be recognised.⁵⁸ Likewise, the Tribunal is not required to refer to or make findings on every piece of evidence before it.⁵⁹ To the extent that Mr Kumar, by Ground 1 or 2 or otherwise, seeks to assert error in the Tribunal's consideration of these matters, or in its findings made (or inference drawn) on these issues, the Tribunal's decision was an "appropriate analysis of the evidence"⁶⁰ before it, and such assertions amount to no more than impermissible merits review.⁶¹

18. As to the passages with which Mr Kumar takes specific issue,⁶² these passages are directed to the Tribunal's consideration of various items of "adverse information" concerning him. These had each been the subject of s.359AA invitations by the Tribunal and the subject of comment by Mr Kumar (both before the Tribunal⁶³ and earlier⁶⁴). The Tribunal, in its decision at [16], [22], [33], [42], clearly set out why it considered such information to be relevant, namely, as matters going both to the credibility of Mr Kumar and the genuineness of his relationship with Ms Clarke. Notably, under s.359 of the Migration Act, the Tribunal was entitled to "get any information" it considered relevant, subject to complying with its procedural fairness obligations under s.359AA and/or s.359A (which it did). As a general proposition, it is not open to Mr Kumar, or this Court, to cavil with the Tribunal's assessment of the matters relevant to its decision making task or with the conclusions drawn (or weight placed on such conclusions) in respect of such matters. That is a function of the decision maker.

⁵⁶ CB 343 [9], CB 349-355 [44]-[80]

⁵⁷ *He* at [49]-[50], [79]

⁵⁸ *He* at [82]

⁵⁹ *He* at [83]; *Applicant WAEF v Minister for Immigration* (2003) 236 FCR 593 at [46]; *Minister for Immigration v Truong* [2016] FCAFC 54 at [80]; *Minister for Immigration v Yusuf* (2001) 206 CLR 323 at [9]-[10], [77]

⁶⁰ *Tran v Minister for Home Affairs* [2019] FCA 1126 at [106]

⁶¹ *Minister for Immigration v SZNPG* [2010] FCAFC 51 at [20]

⁶² CB 343-349 [12]-[16], [19]-[33], [42]

⁶³ CB 336-338

⁶⁴ CB 161-165, 176-182, 189-192, 246-249, 255 at [8], 259-287

19. I accept that on a fair reading, the Tribunal gave proper, fair, and genuine consideration to all of the evidence and submissions before it, had regard to all relevant matters, did not have regard to any irrelevant matters, gave cogent and logical reasons for reaching its conclusions, and did not otherwise fall into jurisdictional error.

Ground 3

20. As the Minister submits, it is clear from the face of the decision record that Mr Kumar *was* afforded procedural fairness and natural justice and, in particular, that Mr Kumar was afforded an opportunity to address the issues raised at [56]-[58]. So much so is apparent from [59]-[63] where the Tribunal set out in detail the response provided by Mr Kumar to the matters discussed at [56]-[58], including Mr Kumar's explanation of the inconsistencies in his evidence.⁶⁵ The Tribunal furthermore was "prepared to accept" at [63], aspects of Mr Kumar's explanation, as provided in that response. The only adverse finding ultimately drawn by the Tribunal in respect of this issue was that its "credibility concerns are further heightened following the receipt of his submission" given that Mr Kumar's written evidence (in that submission) was inconsistent with his earlier oral evidence, as summarised at [56]. The Tribunal was not obliged to put those credibility concerns to Mr Kumar or to invite him to comment on the existence of doubts or inconsistencies.⁶⁶ Moreover Mr Kumar was plainly on notice of the Tribunal's concerns regarding this evidence, and had already taken the opportunity to address them. To the extent that Mr Kumar otherwise seeks to cavil with the Tribunal's findings on his evidence, or the weight given to it by the Tribunal, it is an impermissible attempt at merits review.
21. So far as Mr Kumar, by this ground or more generally, seeks to suggest bias on the part of the Tribunal, Mr Kumar has wholly failed to identify any basis for concluding that the Tribunal did not bring an impartial mind to the decision making process.⁶⁷ Likewise, so far as Mr Kumar contends that there has, more generally, been a denial of procedural fairness, this is contradicted by the plain terms of the Tribunal's

⁶⁵ see also CB 335-338

⁶⁶ *SZBYR v Minister for Immigration* (2007) 81 ALJR 1190 at [18]

⁶⁷ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344-345; *SZUMR v Minister for Immigration* [2017] FCA 1376 at [8]

decision record, which establishes that the Tribunal put to Mr Kumar adverse information before it, in accordance with s.359AA of the Migration Act⁶⁸ and that the Tribunal otherwise complied with its procedural fairness obligations under Part 5.⁶⁹

The non disclosure certificates

22. For completeness, although not raised by Mr Kumar, the Minister also submits that the Tribunal did not err in its treatment of the four certificates issued in respect of Mr Kumar's file. I agree. As set out above, the Tribunal disclosed the existence of each of the certificates to Mr Kumar and gave general particulars as to their nature⁷⁰ and provided Mr Kumar with the opportunity to make submissions on them, in accordance with its procedural fairness obligations.⁷¹ The Tribunal was, furthermore, correct to find that each of those certificates were valid, as:

- a) consistent with Colvin J's decision in *CHZ19 v Minister for Home Affairs*⁷² at [48]-[49], the issuance of the two s.375A certificates on the basis that the folios contained "information regarding DIBP methodology"⁷³ and as to "Departmental procedures"⁷⁴ was "a sufficiently specific reason as to why disclosure was contrary to the public interest".⁷⁵ The certificates therefore satisfied s.375A(1)(a). It is furthermore clear from the face of the certificates that they included a statement that such information only be disclosed to the Tribunal (and so satisfied s.375A(1)(b)); and

⁶⁸see recent summary in *Nguyen v Minister for Immigration* [2019] FCA 159 at [28]; Tribunal decision at [13], [17], [19], [34], [42], [49], [56]-[57], [67], [72], [78]

⁶⁹CB 342 [5] and [7]

⁷⁰CB 348 [33], CB 348-349 [38]-[41]

⁷¹*Minister for Immigration v Singh* (2016) 244 FCR 305 at 309, [12], and 317-318 [53]-[59]; *Parvin v Minister for Immigration* [2019] FCAFC 86 at [42]-[51], [55]

⁷²[2019] FCA 914

⁷³CB 227

⁷⁴CB 293

⁷⁵*CHZ19* at [49]; Noting the different statutory language for s.375A certificates, in contrast to s.438 certificates, and in particular the absence of reference to "a claim in judicial proceedings" in the s.375A language

- b) it is apparent from the face of the two s.376 certificates that they were issued on the basis that the documents and/or information were given "in confidence" and because s.375A does not apply, and they thereby fell within, and satisfied, s.376(1)(b).⁷⁶
23. I further accept that, even if the certificates were found to be invalid, Mr Kumar was not denied an opportunity to give evidence or make arguments nor deprived of the possibility of a successful outcome. Notably, Mr Kumar was informed of the essence of the non-disclosed information, having received (and responded to) invitations to comment on adverse information from the delegate, the first Tribunal, and at the hearings before the second Tribunal,⁷⁷ and in particular was well aware that the Minister's Department (and Tribunal) had concerns as to the genuineness of his relationship with Ms Clarke.⁷⁸
24. Finally, as the Minister notes, there are certain apparent typographical errors in the Tribunal's decision, namely, the mistaken reference to "cl.820.221" at [86], and mistaken references to ss.359 and 359AA at [49] and [67]. I accept that the Tribunal's decision elsewhere contains correct references at [1]-[4] and [8] the Tribunal correctly recorded that it was considering "cl.801.221", and at [19], [34], [42], [56]-[57], [72], and [78] the Tribunal correctly referred to s.359AA. The errors at [49], [67] and [86] were plainly typographical, and, in circumstances where the correct meaning is clearly reflected by the context of the statement and the error was not material to any of the Tribunal's findings, no error can be made out.⁷⁹

Conclusion

25. I find that Mr Kumar has failed to establish that the decision of the Tribunal is affected by any jurisdictional error. The decision is therefore a privative clause decision and the application must be dismissed. I will so order.
26. I will hear the parties as to costs.

⁷⁶CHZ19 at [50]-[52]

⁷⁷ CB 160-165, 175-201, 245-249, 255 at [8], 259-287, 334-338, 344-346 at [17]-[19], 348 at [33], [38], 349 at [39]-[41]

⁷⁸Parvin at [56]-[59], [61]-[62]

⁷⁹*Aslam v Minister For Home Affairs* [2019] FCA 383 at [10]; *S14/2002 v Refugee Review Tribunal* [2004] FCAFC 171 at [27]-[35]

I certify that the preceding twenty-six (26) paragraphs are a true copy of the reasons for judgment of Judge Driver

Associate:

Date: 26 February 2020